

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.

SUITE 1000 WEST

WASHINGTON, D.C. 20005-3317

MICHAEL K. KELLOGG

PETER W. HUBER

MARK C. HANSEN

K. CHRIS TODD

MARK L. EVANS

JEFFREY A. LAMKEN

AUSTIN C. SCHLICK

(202) 326-7900

FACSIMILE

(202) 326-7999

August 15, 1997

BY HAND DELIVERY

Mr. William F. Caton  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, Room 222  
Washington, D.C. 20554

Re: In the Matter of Implementation of the Pay  
Telephone Reclassification and Compensation  
Provisions of the Telecommunications Act of  
1996, CC Docket No. 96-128

Dear Mr. Caton:

Please find enclosed for filing an original and five copies  
of the RBOC/GTE Payphone Coalition's Reply Comments on Telco's  
and Excel's Applications for Review of the Bureau's Orders of  
April 4, 1997 and April 15, 1997.

Please date-stamp and return the extra copy of the reply to  
the individual delivering this filing.

Yours sincerely,



Michael K. Kellogg

Enclosures

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

In the Matter of

Implementation of the Pay Telephone	)	
Reclassification and Compensation	)	CC Docket No. 96-128
Provisions of the	)	
Telecommunications Act of 1996	)	

**THE RBOC/GTE PAYPHONE COALITION'S  
REPLY COMMENTS ON TELCO'S AND  
EXCEL'S APPLICATIONS FOR REVIEW OF THE BUREAU'S  
ORDERS OF APRIL 4, 1997 AND APRIL 15, 1997**

Only one set of comments has been submitted in support of Excel's and Telco's Applications for Review of the Bureau's April 4 and April 15 Orders. Those comments -- filed by CompTel (Aug. 1, 1997) -- suffer from precisely the same defects as Excel's and Telco's Applications for Review. CompTel, like Excel and Telco, failed to participate in proceedings before the Bureau. CompTel, like Excel and Telco, does not identify any adverse effect the waivers will have on it. Instead, having enjoyed the benefits of a decreased carrier common line charge, CompTel, like Excel and Telco, now seeks to avoid paying the per-call compensation that was supposed to replace that charge. Finally, CompTel's arguments, like those of Excel and Telco, are not only procedurally barred but are at odds with the facts and governing law. Special circumstances existed to support granting the waivers, and it would have been manifestly unjust, inequitable, and contrary to the Telecommunications Act's commands to deny them.

I. As the RBOC/GTE Payphone Coalition explained in its Opposition to and Comments on Telco and Excel's Applications for Review of the Bureau's Orders (at 5-6), no party may seek review of a Bureau order unless it participates before the Bureau or explains why such participation was *impossible*. CompTel, like Excel and Telco, has done neither. As a result, all are barred from

seeking review now.<sup>1</sup>

Indeed, to the extent CompTel seeks to assert arguments that differ from those raised by Excel and Telco, its contentions are barred for a second reason -- the arguments were not raised or adverted to by any party before the Bureau. See 47 C.F.R. 1.115(c) (application for review cannot be granted “if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass”). Thus, while CompTel argues (at 3, 4) that the Bureau lacked authority to issue the waivers and that a “misunderstanding” cannot, as a matter of law, support a waiver, neither of these arguments were placed before the Bureau. As a result, neither can be pressed before the full Commission now.

**II.** CompTel's arguments fare no better on the merits. Like Excel and Telco, CompTel seems to argue that, because the payphone orders were clear from the outset, there is no excuse for a limited, 34- or 45-day waiver to permit compliance. But CompTel's argument is (like Excel's and Telco's) unsupported and unsupportable.

In fact, CompTel relies *exclusively* on the “compliance [check]list” from paragraph 131 of the Reconsideration Order; the checklist, it claims, “describ[es] exactly what the LECs had to do before receiving compensation.” CompTel Comments at 4. But this compliance checklist -- which, as its name implies, lists but does not describe LEC obligations in any detail -- does not even address the issues clarified by the April 4 and April 15 orders and for which waivers were granted. In particular, nowhere does the checklist expressly state or even imply that LECs must ensure that their state payphone line tariffs meet the federal new services test even where the service being offered is *not* new. Nor does it expressly state that LECs must file new *federal* tariffs for unbundled features *not used* by LEC-affiliated PSPs.

---

<sup>1</sup>Clearly none of the carriers can claim that participation was *impossible*. Indeed, they could have participated before the Bureau even *after* the orders were issued by filing petitions for reconsideration.

Quite the opposite: As the Coalition pointed out in its Comments (at 7-16), the language of the payphone orders themselves, the Commission's regulations, and the Commission's ONA and CEI precedents all supported the RBOCs' and GTE's contrary understanding. In fact, the plain language of the payphone orders *repeatedly* confirmed the RBOCs' and GTE's understanding that federal tariffing was required *only* for those unbundled features and functions actually used by the LEC-affiliated PSP. RBOC/GTE Payphone Coalition Comments at 7-10. Likewise, the orders *repeatedly* indicated that the new services test applied *only* to services that in fact were "new." Id. at 12-16. And the Commission's regulations and precedents confirmed these readings. See id. at 7-16. Indeed, the orders were so clear that, in the RBOCs' and GTE's view, the Bureau's contrary conclusions would have been subject to legal challenge for lack of notice if the Bureau had failed to grant the waivers. Id. at 10 (citing cases reversing agency orders for lack of sufficient notice). Despite the fact that these arguments -- and the supporting language from the payphone orders, the Commission's regulations, and its precedent -- were placed before the Bureau<sup>2</sup> and the Bureau relied on them,<sup>3</sup> CompTel (like Excel and Telco) ignores them entirely.

**III.** Unable to mount a convincing challenge to the Bureau's finding that the RBOCs and GTE relied on the language of the payphone orders in good faith, CompTel argues that -- because a motion for clarification can and should be filed in cases of uncertainty -- a "misunderstanding" of a Commission order can never be the basis for a waiver. CompTel Comments at 4. CompTel, however, never raised this issue below, see pp. 1-2 supra, and it is meritless in any event.

---

<sup>2</sup>Letter from Michael K. Kellogg to Mary Beth Richards, Deputy Bureau Chief, Common Carrier Bureau, FCC, at 4-5 (Mar. 19, 1997); Letter from Michael K. Kellogg to Mary Beth Richards, Deputy Bureau Chief, Common Carrier Bureau, FCC, and Kathy Franco, Legal Counsel to the Bureau Chief, Common Carrier Bureau, FCC, at 4-11 (Mar. 25, 1997).

<sup>3</sup>See April 4 Order at 11, ¶ 20 (relying on "the language" the RBOC Coalition "cites from the two orders in the Payphone Reclassification *proceeding*"); April 15 Order at 9, ¶¶ 18 (same).

As an initial matter, contrary to CompTel's assertions, the RBOCs and GTE were not obliged to seek "clarification" of the payphone orders because, in their view, the orders were clear: The federal tariffing requirements extended *only* to unbundled services actually used by the affiliated PSP, and the new services test applied *only* to services that in fact were new. The payphone orders state as much. See RBOC/GTE Payphone Coalition Comments at 7-8, 12-15 (quoting the payphone orders). The RBOCs and GTE cannot be faulted for relying on this language.

Besides, CompTel cites no precedent to support its assertion that a legitimate, good-faith, misunderstanding of Commission requirements (ambiguous or not) cannot form the basis of a limited, 34- or 45-day waiver. To the contrary, in the past, the Commission has granted waivers when it clarifies its orders in a manner that takes industry participants by surprise or otherwise leaves them unable to adjust their affairs to comply by the deadline. See e.g., Rules and Policies Regarding Calling Number Identification Service -- Caller ID, 11 FCC Rcd 17454 (1996) (granting waiver where switch software necessary to implement requirement was delayed).

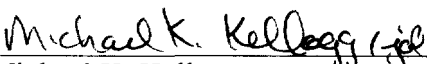
Indeed, the case for such a waiver is particularly strong here. Granting the waiver in no way undermines the purposes of the Act or imposes any undue hardship. Indeed, none of the independent PSPs -- the only market participants who might conceivably buy the unbundled elements and payphone lines affected by the limited waivers -- have objected to the waivers. Denying the waiver, in contrast, would have created significant hardship. It would have deprived LECs of per-call compensation despite their good faith reliance on the language of the payphone orders. And it would have deprived them of per-call compensation despite their removal of the subsidies formerly used to support payphones, in direct contravention of the Act's admonition that such subsidies be eliminated *in favor of* per-call compensation, 47 U.S.C. § 276(b)(1)(B), and its express requirement that such compensation be paid for *each and every call* made from a payphone, *id.* § 276(b)(1)(A).

IV. Finally, CompTel argues that the Bureau lacks authority to issue the waivers. Setting aside CompTel's failure to assert this argument below -- a failure that bars CompTel's effort to assert that argument here, see pp. 1-2, supra -- the argument is frivolous. For one thing, the payphone orders delegate all issues concerning compliance with the payphone orders to the Bureau. See Reconsideration Order ¶ 132; see also id. ¶ 163. For another, it is well established that the Bureau is empowered to receive and act upon such waivers in the first instance. See e.g., Order, Southwestern Bell Telephone Company Tariff F.C.C. No. 73, DA 97-701, 1997 FCC LEXIS 1900 (Apr. 8, 1997) (Bureau granting a waiver of Commission's rules *sua sponte*); Order, New York Telephone Company and New England Telephone and Telegraph Company, DA 97-524, 1997 FCC LEXIS 1413 (Bureau granting a waiver of the Commission's rules regarding nonrecurring reconfiguration charges for expanded interconnection services). Indeed, if the Bureau has authority to *impose* these requirements by issuing the clarification order, surely it also must have authority to temper that order by providing a limited waiver of the deadline for compliance. CompTel again cites nothing to the contrary.

#### **Conclusion**

Excel's and Telco's Applications for Review should be dismissed or denied.

Respectfully submitted,

  
\_\_\_\_\_  
Michael K. Kellogg  
Jeffrey A. Lamken  
KELLOGG, HUBER, HANSEN, TODD  
& EVANS  
1301 K Street, N.W.  
Suite 1000 West  
Washington, D.C. 20005  
(202) 326-7900

Counsel for the RBOC/GTE Payphone Coalition

August 15, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 1997, I caused copies of the foregoing RBOC/GTE Payphone Coalition's Reply Comments on Telco's and Excel's Applications for Review of the Bureau's Orders of April 4, 1997 and April 15, 1997 to be served upon the parties listed below by first-class mail.

Dana Frix  
C. Joel Van Over  
Pamela Arluk  
Swidler & Berlin  
3000 K Street, N.W.  
Suite 300  
Washington, DC 20007

Danny E. Adams  
Steven A. Augustino  
Kelley Drye & Warren LLP  
1200 19<sup>th</sup> Street, N.W.  
Suite 500  
Washington, D.C. 20036

Genevieve Morelli  
The Competitive Telecommunications Association  
1900 M Street, N.W.  
Suite 800  
Washington, D.C. 20036

  
\_\_\_\_\_  
Kevin J. Cameron